(2)

No. 90-247

In the Supreme Court of the United States

OCTOBER TERM, 1990

DANIEL H. OVERMYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals applied the correct standard in determining that the government had satisfied its burden under *Kastigar* v. *United States*, 406 U.S. 441 (1972), to show that it did not improperly use petitioner's immunized testimony from bankruptcy proceedings in bringing the instant prosecution.

2. Whether the court of appeals properly adverted to the harmless error doctrine in the circumstances of this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 899 F.2d 457. A previous opinion of the court of appeals, reversing the district court's post-verdict judgment of acquittal, is reported at 867 F.2d 937. The opinion of the district court (Pet. App. A32-A36) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1990. A petition for rehearing was denied on May 10, 1990 (Pet. App. A37). The petition for a writ of certiorari was filed on August 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of submitting a false claim in bankruptcy, in violation of 18 U.S.C. 152.[1] The district court granted a post-trial motion for acquittal, but the court of appeals reversed. 867 F.2d 937 (1989). On remand, petitioner was sentenced to three years' imprisonment (all but six months of which were suspended), to be followed by three years' probation, and he was fined $5,000. The court of appeals affirmed. Pet. App. A1-A31; 1 C.A. App. 34.

1. The evidence at trial, the sufficiency of which is not challenged here, established that petitioner caused Hadar Leasing International Co., Inc. (Hadar) to file a false proof of claim in the Chapter 11 bankruptcy proceeding of D.H. Overmyer Telecasting Co., Inc. (Telecasting), a company that petitioner had previously controlled. Pet. App. A3.

In 1966, petitioner founded Telecasting in Toledo, Ohio, to operate a television station. Telecasting leased its broadcast equipment from an affiliated company controlled by petitioner. From 1976 through 1981, Hadar was the affiliated company that leased equipment to Telecasting. Pet. App. A4-A5.

Beginning in 1973, petitioner became involved in a series of bankruptcy proceedings. In 1973, a warehouse company controlled by petitioner, together with its related entities, entered Chapter 11 bankruptcy

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[1]Petitioner was also charged with five other counts of bankruptcy fraud (18 U.S.C. 152), two counts of conspiracy to commit those offenses (18 U.S.C. 371), and one count of mail fraud (18 U.S.C. 1341). The district court dismissed five of those other counts, and the jury acquitted on three counts. Pet. App. A3-A4.

proceedings in New York. In 1976, Telecasting also filed for Chapter 11 bankruptcy protection in New York; that proceeding was dismissed in 1980. In February 1981, Telecasting again filed for Chapter 11 bankruptcy protection, this time in Cleveland, Ohio. The next month, the bankruptcy court in the Northern District of Ohio awarded the operation of Telecasting to Telecasting's major creditor, the First National Bank of Boston. Thereafter, petitioner had no control over Telecasting. Pet. App. A5-A6.

An accountant hired by First National Bank of Boston to review Telecasting's records determined that, from 1978 through 1981, Telecasting had made lease payments to Hadar that bore no relationship to the terms of the lease. The accountant concluded that by the end of August 1979 Telecasting had overpaid Hadar approximately $473,000 and that by January 1981 Telecasting had overpaid Hadar by approximately $500,000. Pet. App. A6.

On August 7, 1981, Hadar filed a claim for $859,-481.80 in the Telecasting bankruptcy proceedings. The proof of claim rested on broadcast equipment leases between Hadar and Telecasting, a $400,000 deposit, and some $249,000 in claimed installation costs. Pet. App. A6-A7, A29 n.4. In 1982, the bankruptcy judge issued a 116-page opinion, in part of which he found extensive fraud in the dealings between Hadar and Telecasting. *Id.* at A7-A8. He determined that the Hadar leases were "designed to conceal the looting of Telecasting" by petitioner and that Hadar's proof of claim was "fraudulent." *Id.* at A7.

2. In January 1986, the government obtained an indictment against petitioner. Count 1 of the indictment charged petitioner and a co-defendant with the fraudulent presentation of Hadar's proof of claim in the 1981 Telecasting bankruptcy proceeding. The in-

dictment alleged that the Hadar-Telecasting leases were "shams" and were designed solely to funnel money from Telecasting to other entities controlled by petitioner. Count 1 also charged that the proof of claim was false and that certain equipment, for which installation charges were assessed, had never been installed. Pet. App. A8-A9.

Prior to trial, petitioner moved to dismiss the indictment on the ground that the government had improperly used his immunized testimony to obtain the indictment. Petitioner claimed that he had given immunized testimony in 1976 and 1977 in the course of the 1973 warehouse company bankruptcy proceedings and the 1976 Telecasting bankruptcy proceedings, and that the government had used that testimony in obtaining the false claim indictment. Pet. App. A9-A10.[2]

In September 1986, the district court conducted a hearing under *Kastigar* v. *United States*, 406 U.S. 441 (1972), to determine whether the government had made any direct or indirect use of petitioner's testimony. The government presented the testimony of the Assistant U.S. Attorney who had presented

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[2] The bankruptcy statute at the time provided that persons testifying at certain bankruptcy proceedings automatically received use immunity for their testimony. 11 U.S.C. 25(a)(10) (1976). The bankruptcy statute was subsequently revised. Immunity is now provided under 18 U.S.C. 6001 *et seq.* See 11 U.S.C. 344.

In support of his motion to dismiss the indictment, petitioner submitted six transcripts. Five were from 1976 and 1977; one was from 1982, but the pertinent portion of that transcript was an excerpt from a 1977 transcript already included as a separate exhibit. Additionally, one of the five transcripts from 1976 and 1977 did not contain any testimony by petitioner. Pet. App. A19, A31 n.11, A33; Gov't C.A. Br. 9, 16.

the case to the grand jury and the three FBI agents assigned to the case. Each witness testified that he had not read petitioner's immunized testimony and did not make any use of the testimony. Each witness also said that the government's investigation was based on the 1981 Telecasting bankruptcy proceedings and the bankruptcy court's 1982 opinion in that case. Pet. App. A10.[3]

In response, petitioner called John Silas Hopkins, a lawyer for the First National Bank of Boston, as a witness. Hopkins testified that he had met with the government many times in connection with the investigation of petitioner. On behalf of First National Bank, Hopkins had taken part in two civil actions involving petitioner (in 1980 and 1982), and had taken petitioner's deposition twice in those proceedings. Hopkins had read petitioner's immunized testimony for purposes of completeness, but considered it unimportant.[4] Asked whether he had imparted information to the government about petitioner's prior testimony, Hopkins said that he might have imparted information to the government from petitioner's non-immunized deposition testimony, but that, in his view, there was nothing in the transcripts of the 1976 proceedings that would have been of interest to the government, and that, if asked, he would have said as much. Pet. App. A11-A12.

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[3] Another prosecutor initially assigned to the investigation submitted an affidavit stating that she likewise had not read petitioner's immunized testimony. A third prosecutor, who assisted at trial, made the same representation on the record. Pet. App. A10, A29 n.6.

[4] During one deposition, Hopkins used a small portion of the 1976 proceeding to refresh petitioner's recollection on one question. Pet. App. A11.

The district court denied petitioner's motion. The court found that the government had not used petitioner's immunized testimony in the investigation or the presentation of the case to the grand jury. The court determined that, with one exception, the prosecutors and the FBI agents had not even been aware of petitioner's prior testimony. With regard to that exception, the court found that the government had demonstrated that the immunized testimony was not "utilized in the investigation or presented to the grand jury." Pet. App. A35. The court also reviewed petitioner's immunized testimony and concluded that it had "little relevance" to the criminal case but instead was concerned with events that occured several years prior to the time involved in the indictment. *Ibid.*

3. Petitioner renewed his immunity claim on appeal. The court of appeals concluded that the district court correctly found that petitioner's 1976 and 1977 bankruptcy testimony had little or no bearing on whether Hadar's 1981 proof of claim was fraudulent, because petitioner's immunized testimony "did not reveal the pattern of fraud demonstrated by the relationship between Hadar and Telecasting which resulted in the filing of the proof of claim in 1981." Pet. App. A20. Analyzing the exhibits submitted by petitioner at the *Kastigar* hearing, the court determined that "[n]one of the testimony given in these proceedings indicates fraud or suggests in any way that [petitioner] was making use of the lease arrangements between Telecasting and Trucking [Hadar's former name] for his personal gain," *id.* at A22; the court emphasized that "there was no suggestion or questioning regarding the status of payments between Telecasting and Trucking that would reflect that Trucking was overpaying Telecasting,"

id. at A22-A23. The court also found that, although a minor portion of the transcripts "relates to the later criminal prosecution for filing a false proof of claim, we find this relationship to be so remote that any use would constitute harmless error, especially in light of the lengthy and substantial testimony of [petitioner], which was not immunized." *Id.* at A23. Finally, the court found that the government had satisfied its burden under *Kastigar* of establishing a legitimate independent source for the evidence used at petitioner's trial. The court pointed out that the government had the following independent sources of information: the 1982 opinion by the bankruptcy judge; petitioner's own non-immunized testimony on four separate occasions in 1980 and 1981; and other persons who provided information to the government. The court found that none of the latter information was based on petitioner's immunized testimony. *Id.* at A23-A24.[5]

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[5] The court of appeals also rejected petitioner's claims of government misconduct and other errors in the proceedings before the grand jury. Pet. App. A24-A27. Petitioner does not renew those claims in this Court.

ARGUMENT

1. Petitioner contends (Pet. 12-21) that the court of appeals applied an incorrect standard in making its *Kastigar* determination. Contrary to his claim, the decision below is correct and does not conflict either with *Kastigar* or with any decision by any other court of appeals.

In *Kastigar*, this Court held that a grant of use immunity under 18 U.S.C. 6002 prohibits the use of compelled testimony and evidence derived from that testimony in later criminal proceedings. 406 U.S. at 453. Accordingly, when a person who testifies under a grant of use immunity is indicted for matters that relate to his immunized testimony, the "prosecution [has] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *Id.* at 460.

Petitioner claims that the courts below failed to require the government to adhere to that standard because the courts did not require the government to make a line-by-line showing of an independent source for each item of evidence that was introduced. Pet. 19-20. In support of that claim, petitioner relies on *United States* v. *North*, No. 89-3118 (D.C. Cir. July 20, 1990), slip op. 44-45, petition for rehearing pending, No. 89-3118, and *United States* v. *Hampton*, 775 F.2d 1479, 1485-1488 (11th Cir. 1985). Whatever the correctness of the *North* and *Hampton* decisions, however, this case is entirely distinguishable from those cases. In this case, both the court of appeals and the district court explicitly determined that the immunized testimony was largely irrelevant to the criminal charge at issue. See Pet. App. A20 ("[T]he district court was not in error in

concluding that [petitioner's] *Kastigar* transcripts contained little relating to the issues in the criminal case."); *id.* at A35 ("[T]he court has reviewed with care the transcripts of all the prior testimony of [petitioner] at issue and finds that this testimony has little relevance to the claims made in the indictment. * * * [T]he transcripts * * * involve primarily events which occurred years earlier and are not related to this indictment.").[6] Neither *North* nor *Hampton* contains such a determination. Indeed, in *North*, it was undisputed that the immunized testimony at issue related to the charges in the indictment, slip op. 2-3; *United States* v. *Poindexter*, 698 F. Supp. 300, 302 (D.D.C. 1988), rev'd *sub nom. United States* v. *North*, *supra*; the court remanded for a determination whether the immunized testimony affected the witnesses' testimony in the grand jury and at trial. Slip op. 26-36, 42-45. In *Hampton* the court reversed specifically because it found that "new information contained in the immunized testimony * * * may have furthered the state and federal investigation." 775 F.2d at 1486. Thus, far from representing "a total evisceration of *Kastigar*" (Pet. 20), the court of appeals' decision in this case simply reflects a determination that the immunized testimony was essentially irrelevant to the criminal charge against petitioner.[7]

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[6] It is settled that, "absent the most exceptional circumstances," this Court will not disturb "factual determinations in which the district court and the court of appeals have concurred." *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

[7] The *North* and *Hampton* decisions are readily distinguishable for other reasons as well. In *North*, the court of appeals considered a situation that it regarded as involving "immunized testimony * * * so broadly disseminated that interested parties study it and even casual observers have some

2. Petitioner also argues (Pet. 21-27) that the court of appeals incorrectly invoked the harmless error doctrine. As noted, the court held that the relationship between the immunized testimony and the criminal prosecution was "so remote that any use would constitute harmless error." Pet. App. A23. Petitioner contends that the court of appeals erred in applying harmless error analysis to his claimed *Kastigar* violation. Every court of appeals that has considered the question has held that a *Kastigar* violation is subject to harmless error analysis; indeed, that point is specifically recognized in the two decisions relied on by petitioner for the first point in his petition. See *North*, slip op. 9, 45; *Hampton*, 775 F.2d at 1489 n.51. See also *United States* v. *Serrano*, 870 F.2d 1, 16 (1st Cir. 1989); *United States* v. *Gallo*, 859 F.2d 1078, 1082-1084 (2d Cir. 1988), cert. denied, 490 U.S. 1089 (1989); *id.* at 1090 (Van Graafeiland, J., concurring); *United States* v. *Shelton*, 669 F.2d 446, 464 (7th Cir.), cert. denied, 456 U.S. 934 (1982); *United States* v. *Rogers*, 722 F.2d 557, 560-561 (9th Cir. 1983), cert. denied, 469 U.S. 835 (1984); *United States* v. *Beery*, 678 F.2d 856, 860 & n.3, 863 (10th Cir. 1982); *United States* v. *Byrd*, 765 F.2d 1524, 1529 n.8, 1532 (11th Cir.

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notion of its content" (slip op. 24-25) and in which "many grand jury and trial witnesses were thoroughly soaked in [the defendant's] immunized testimony" (*id.* at 26). In *Hampton*, the court of appeals concluded that federal investigators received and reviewed state investigative files without knowing that those files contained immunized testimony, and that the investigators subsequently used the state materials for much of their investigation. The government then failed to show an independent basis for much of its evidence. 775 F.2d at 1480-1490. Nothing comparable is present in this case.

1985); *United States* v. *Gregory*, 730 F.2d 692, 698 (11th Cir. 1984), cert. denied, 469 U.S. 1208 (1985).

Rather than addressing the decisions applying harmless error analysis to claimed *Kastigar* violations, petitioner invokes *Santobello* v. *New York*, 404 U.S. 257 (1971), and subsequent cases that address the right to enforcement of a plea bargain or a cooperation agreement with the government. Petitioner's reliance on those decisions is misplaced for several reasons. First, the statutory conferral of immunity —and accompanying legal duty to testify—is not analogous to the "bargains" in the decisions cited by petitioner. See *United States* v. *Gallo*, 859 F.2d at 1090 (Van Graafeiland, J., concurring) (The defendant "had no choice whether to accept [the immunity]; he was required to testify. This is not the stuff of which contracts are made. This case clearly is distinguishable from those in which promises of immunity or lighter sentences are made in exchange for agreements to plead or cooperate. * * * In those cases, the typical contractual requirements of offer and acceptance are present. Here, we have neither.").[8] Second, three of the decisions cited by petitioner involve a governmental promise of *transactional* immunity—which, of course, is more than the Fifth Amendment requires (*Kastigar*, 406 U.S.

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[8] Petitioner's claim that, in fact, he faced a voluntary choice —testifying truthfully, entering into civil contempt, or perjuring himself (Pet. 26)—is unavailing. Unlike the defendants in the "bargain" cases, petitioner's only choice was whether to obey the law or not. Petitioner's cited references (Pet. 26 & nn.11-15) to statutory immunity as an "exchange" in the legislative history and in *United States* v. *Apfelbaum*, 445 U.S. 114 (1980), recognize that immunity serves to displace the witness's Fifth Amendment privilege, but do not suggest that the "exchange" is in any way voluntary on the part of the witness.

at 453), and which would be violated by the institution of *any* prosecution.[9] Third, and most fundamentally, petitioner misapprehends the meaning of a finding of "harmless error." An error of constitutional dimension is harmless if the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24 (1967). Petitioner's protestations of unfairness fail to appreciate the significance of a harmless error determination, and the burden that is necessary to sustain it.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] See *United States* v. *Brown*, 801 F.2d 352 (8th Cir. 1986); *Rowe* v. *Griffin*, 676 F.2d 524 (11th Cir. 1982); *United States* v. *Carter*, 454 F.2d 426 (4th Cir. 1972). Two other decisions cited by petitioner—*United States* v. *Weiss*, 599 F.2d 730 (5th Cir. 1979), and *United States* v. *Lyons*, 670 F.2d 77 (7th Cir.), cert. denied, 457 U.S. 1136 (1982)—hold that there was no violation of a government promise or agreement at all.

[10] It is also notable that three of the decisions cited by petitioner (*Rowe* v. *Griffin*, *supra*; *United States* v. *Lyons*, *supra*; and *United States* v. *Brimberry*, 744 F.2d 580 (7th Cir. 1984)) are from circuits that have explicitly found *Kastigar* errors to be subject to harmless error analysis. See *United States* v. *Shelton*, *supra*; *United States* v. *Byrd*, *supra*.

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